at the rear number plate of the motor cycle. Then this person said in Malay 'Bukan nombor ini, jalan'. Then the rider of the motor cycle, Putupathy, started the motor cycle and we proceeded on. . . ."

It is observed that the person who stopped Putupathy and PW6 wore mask. Had the accused been his accomplices, one would expect the whole group to wear masks. However, on being questioned by the learned President, PW4 said that he did not see the accused wearing any mask. Be that as it may, the learned President should have entertained certain degree of suspicion on the credibility of PW4 as to whether or not the assailants were masked.

PW4 said on oath that there was no misunderstanding between him and the appellants but the attack on PW4, PW5 and PW6 was vicious and with vengeance. Again, although motive of the attack is only relevant in so far as it is one of the several aspects to test the credibility of PW4, it was the duty of the learned President to weigh the veracity of the evidence of PW4 bearing in mind the want of motive. As Ong F.J. (as he then was) in the Federal Court case of *Mahinder Singh, supra,* said —

"There are certain other material facts, too, which could not be consistent with guilt. There admittedly was no animosity between the parties and the complainant himself could think of no reason why the appellant should have made the unprovoked attack on him. If there was no reason, on the one hand, for a false accusation, there was equally no reason, on the other, for the appellant to attack his inoffensive neighbour. The seriousness of the injury and the kind of weapon used should rather point to a vicious enemy. . . ."

Considering the grounds of judgment of the learned President as a whole, I am satisfied that no sufficient care had been given by the learned President in testing the evidence of PW4 with the evidence of PW5 and PW6 and such failure has resulted in a miscarriage of justice. In consequence, I am satisfied that it was unsafe for the learned President to convict the appellants relying solely on the evidence of PW4 without first cautioning himself before doing so.

It is not enough for the learned President to believe PW4 regarding the identification of the appellants just because PW4 had known the appellants for quite a considerable length of time. At the material day and time, he was able to see the appellants in a flash. As Lord Widgery C.J. said in the English Court of Appeal case of *R.* v. *Turnbull & Ors., supra,* at page 552 —

". . . even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

On the above grounds I would allow the appeal and set aside the conviction and sentence.

Appeal allowed.

Conviction quashed and sentence set aside.

Solicitors: *R.K. Menon & Co.*

TUMLONG KUANDI v. PUBLIC PROSECUTOR

[A.Cr.J. (Yusof Abdul Rashid J.) May 19, 1981]

[Johore Bahru — Criminal Appeal No. 30 of 1980]

Customs and Excise — Conveying dutiable goods in local craft without permit — Strict liability — Customs Act, 1967, ss. 49(1) & 135(1)(e).

The appellant sought to appeal against the whole judgment of the learned magistrate who convicted and sentenced him for offences under section 49(1) and section 135(1)(e) of the Customs Act 1967. The appellant was the *taikong* of a vessel carrying 3.195 tons of tin ore and 5.129 tons of tin slag. The said vessel was intercepted by customs officers on December 24, 1979. The appellant failed to produce any permit and the vessel was seized. The learned magistrate had found that the vessel was intercepted when it was within the Malaysian Territorial Waters.

The appellant contended that (1) he did not know that he was in Malaysian Territorial Waters or that he was required to have permission to convey the said tin ore; (2) it was encumbent on the prosecution to prove that the tin ore and slag found in the vessel was for export out of Malaysia; (3) on the appellant being successful in establishing that the vessel was in transit, the appellant had made out a valid defence deserving acquittal.

Held: (1) the prosecution need only to prove that, on import or export, customs duties are leviable on such goods without having to prove that such goods are in fact imported into or exported out of Malaysia;

(2) even if the vessel was in transit, it is obligatory on the consignor or consignee of the goods to obtain written permission of the Director-General of Customs where the vessel was to pass through Malaysian Territorial Waters. Failure to obtain such written permission would expose the person responsible for the vessel to a charge under section 49(1) of the Customs Act;

(3) the offence created is a strict liability offence, the commission of which requires no guilty intention or knowledge; in the circumstances it was no defence for the appellant to contend that he did not know that he was in Territorial Waters of Malaysia at that material time and place;

(4) the prosecution had failed to prove that the goods conveyed in the "local craft" were "dutiable goods" since the prosecution had failed to prove that such goods were indeed exported out of Malaysia. The conviction and sentence under section 135(1)(e) of the Customs Act were set aside;

(5) in the present case an offence under section 49(1) of the Customs Act had been committed and proved. In the circumstances, the appeal against the forfeiture of the "local craft" and tin ore and tin slag was dismissed.

Case referred to:-

(1) *Ng Kim Huat* v. *Public Prosecutor* [1961] M.L.J. 308.

CRIMINAL APPEAL.

R.K. Menon for the appellant.

Abu Seman bin Haji Yusof (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: This is an appeal against the whole judgment of the learned Magistrate who convicted and sentenced the appellant for offences firstly under section 49(1) and secondly under section 135(1)(e) of the Customs Act 1967. The goods seized by the customs in relation thereto were ordered to be forfeited. I allowed the appeal against the conviction and sentence under section 135(1)(e) of the Act but dismissed the appeal in respect of the first charge. Now I state my reasons.

The facts of the case may be briefly stated thus:

"On December 24, 1979 at about 4.15 p.m. a customs ambush party saw a vessel in Malaysian Territorial Waters travelling southwards off the coast of Kukup, Pontian. The customs officers intercepted it and seized the vessel and the goods conveyed in it when it was found that the vessel was a 'local craft' carrying 3.195 tons of tin ore and 5.129 tons of tin slag. The appellant who was the taikong of the said 'local craft' failed to produce any permit issued by the Director-General of Customs for conveying such goods in a 'local craft'. The appellant contended that he had sailed from Phuket Island, Thailand, with the goods which were to be delivered to Singapore and that he was detained by the Customs while on transit."

The prosecution had proved beyond reasonable doubt that the vessel of which the appellant was the taikong was a "local craft" for the purposes of the Customs Act 1967 being a vessel which weighed 39.6 tonnes, i.e. less than seventy-five net registered tons. It was also an undisputed fact that the tin ore and tin slag, had they been exported out of Malaysia, were dutiable goods under the Customs Duties Order, 1978 [P.U.(A) 391/77]. The learned Magistrate found, with which finding I have no reason to disagree, that the said local craft was intercepted when it was within the Malaysian Territorial Waters.

In evidence the appellant testified that on December 21, 1979 he left Phuket Island, Thailand, in a vessel loaded with tin ore and tin slag with six crew for Singapore. It was a fishing vessel, in good condition, and fitted with a compass which was also in good condition. The appellant contended that he did not know that he was in Malaysian Territorial Waters and that when in Malaysian Territorial Waters he was required to have the permission of the Director General of Customs Malaysia to convey the said tin ore and tin slag in the said vessel.

Now section 49(1) of the Customs Act 1967 provided —

"(1) No goods of a class dutiable on import or export or prohibited goods shall be carried in any local craft except with the permission of the Comptroller-General and subject to such conditions as the Comptroller-General may impose."

and this section found its origin in section 47(1) of the Customs Ordinance 1952. Before being amended by the Customs (Amendment) Act 1964 (Act 25/64), section 47(1) of the Customs Ordinance 1952 read —

"(1) No dutiable or prohibited goods shall be carried in any local craft except with the permission of the Comptroller and subject to such conditions as the Comptroller may impose."

and in that form the section was judicially considered by Thomson C.J. (as he then was) in the case of *Ng Kim Huat* v. *Public Prosecutor*[1] wherein his Lordship said —

"Under section 47, it is an offence to carry 'dutiable goods' in any local craft (i.e. a vessel under 75 net registered tons) except with the permission of the Comptroller of Customs.

By section 2 'dutiable goods' are 'goods subject to the payment of customs duty and on which such duty has not yet been paid'. By section 10 customs duties may be levied on goods 'imported into or exported from the Federation'. It is thus clear that the same goods may at different stages of their existence be 'dutiable goods'. I buy a bottle of whiskey in England. At that stage it is not 'dutiable goods' within the meaning of the Ordinance. I then import it (I am coming to the meaning of import) into the Federation and it becomes 'dutiable goods'. I then pay duty upon it and it ceases to be 'dutiable goods'. It is only 'dutiable goods' between the moment when it is first imported and the moment on which duty is paid. In other words, before goods on which customs duties have been levied can be described as 'dutiable goods' for the purposes of the Ordinance they must comply with both of two conditions. One is that they must have been imported, and the other is that duty must not yet have been paid on them.

Now, 'import' means to bring into the Federation, but that definition is subject to the following qualification:—

'In transit' means taken from any other country and brought into the Federation for the sole purpose of being carried to another country and 'uncustomed goods' are goods in respect of which a breach of the provisions of the Ordinance has been committed. All these definitions are to be found in section 2."

In 1964, Parliament deemed it necessary to amend the said section 47(1) by substituting for the word "dutiable" the words "goods of a class dutiable on import or export" and as a result the amended section 47(1) read —

"(1) No *goods of a class dutiable on import or export* or prohibited goods shall be carried in any local craft except with the permission of the Comptroller and subject to such conditions as the Comptroller may impose."

The Customs Ordinance 1952 was repealed and re-enacted as Customs Act 1967 under which the said section 47(1) was re-enacted as section 49(1) the provisions of which read —

"(1) No goods of a class dutiable on import or export or prohibited goods shall be carried in any local craft except with the permission of the Comptroller-General subject to such conditions as the Comptroller-General may impose."

and on it being revised in 1980 as Act 235 the provisions of section 49(1) underwent no change except that the words "Director General" have been substituted for the words "Comptroller-General.".

It was contended by the counsel for the appellant that it was encumbent on the prosecution to prove that the tin ore and tin slag found conveyed in the vessel to have been exported out of Malaysia, for a charge under section 49(1) of the Customs Act 1967 and that on the appellant being successful in establishing that the vessel was in transit that the appellant had made up a valid defence deserving an acquittal. I had no hesitation in rejecting the contentions.

In my judgment the words "goods of a class dutiable on import or export" found in section 49(1) of the Act refer to a class of goods included and comprehended under the general description that had the goods been imported into or exported out of Malaysia, customs duties would have been leviable thereon. These goods need not necessarily be *prima facie* dutiable goods under the Act and it is sufficient if it could be proved that such goods belong to a class of goods which on import or export become dutiable goods. In the circumstances the prosecution need only prove that, on import or export, customs duties are leviable on such goods without having to prove that such goods are in fact imported into or exported out of Malaysia. To accede to the contention of the counsel for the appellant would be to fly in the face of the provisions of section 49(1) of the Act.

In its original form, when it was expounded by Thomson C.J. (as he then was), it would only be an offence under section 47(1) of the Customs Ordinance 1952 if the prosecution could prove that the goods were indeed imported into or exported out of Malaysia. However, since its amendment, it was a deliberate intention of the Legislature to differentiate between "duti-

able goods on import or export" and "goods of a class dutiable on import or export". One need only to consider the mischief that the Legislature intended to cure by the amendment to ascertain the true meaning of those words. All the Legislature wished to prevent was the evasion of customs duties when goods were in fact imported into or exported out of Malaysia. If indeed the said goods were on transit then, unless the said goods were expressly exempted, permission of the relevant authority was required. Nothing is simpler than to convey goods in a "local craft" for that purpose. Thus, if in fact the local craft was in transit then it is encumbent on the consignor or consignee of such class of goods to obtain written permission of the relevant authority. In this case the goods were not even accompanied by any manifest or other documents let alone being permitted by the authority to be conveyed in a local craft in Territorial Waters. In the circumstances, should the defence that the vessel was on transit be available, it would render the provisions of section 49(1) of the Act nugatory and ineffective as a means to cure the intended mischief.

In my view even if the vessel was in transit, it is obligatory on the consignor or consignee of the goods to obtain written permission of the Director-General of Customs where the vessel were to pass through Malaysian Territorial Waters. Failure to obtain such written permission would expose the person responsible for the vessel to a charge under section 49(1) of the Act.

It was further submitted on behalf of the appellant that since the appellant did not know that he was in Malaysian Territorial Waters, he had a good defence for a charge under section 49(1) of the Act. On reading the provisions of section 49(1), I was of the view that the offence thereunder created is a strict liability offence, the commission of which requires no guilty intention or knowledge. Not only the words "knowingly", "intentionally" or "wilfully" are not used in section 49(1) of the Act, the effect of the said section would be nullified if a court were to interpret the provisions as being otherwise than strict liability offence.

In the circumstances it was no defence for the appellant to contend that he did not know that he was in Territorial Waters of Malaysia at that material time and place.

As stated earlier I allowed the appeal against the conviction and sentence under section 135(1)(e) of the Customs Act as to my mind the facts disclosed had not established that such an offence had been committed. In the lower court the appellant was charged for "knowingly concerned in conveying dutiable goods ... such goods being dutiable on export under the Customs Duties Order, 1978 (P.U.(A) 393/77) with intent to defraud the Government of the duties thereon..." On the authority of *Ng Kim Huat, supra,* the prosecution had failed to prove that the goods conveyed in the "local craft" were "dutiable goods" since the prosecution had failed to prove that such goods were indeed exported out of Malaysia. On this ground alone the appellant should succeed and I accordingly set aside the conviction and sentence on the charge under section 135(1)(e) of the Act.

The learned Magistrate in the lower court ordered that the "local craft", the tin ore and the tin slag be forfeited. Such forfeiture order was upheld and confirmed. Under section 127(1) of the Act

> "An order for forfeiture ... of anything liable to forfeiture ... shall be made by the court ... if it is proved ... that an offence against this Act ... has been committed and that the goods were the subject matter of or were used in the commission of the offence...."

In the instant appeal an offence under section 49(1) of the Act had been committed and proved. The tin ore and tin slag were proved to be "goods of a class dutiable on import or export" and were the subject-matter of the charge. Such goods were conveyed in the "local craft" seized by the customs. In the circumstances, the order for forfeiture of the "local craft", tin ore and tin slag was made in accordance with section 127(1) of the Act.

The appeal against the forfeiture of the goods was also dismissed.

Order accordingly.

Solicitors: *R.K. Menon.*

DIAMOND PEAK SDN. BHD. & ANOR. v. D.R. TWEEDIE

[O.C.J. (Gunn Chit Tuan J.)
March 23 & 24, July 14, 20 & 29, 1981]

[Penang — Civil Suit No. 362 of 1978]

Land Law — Sale and purchase agreement — Correspondence — "The technical details I leave to my lawyers" — Whether binding.

The plaintiffs claimed specific performance of an oral agreement whereby the defendant had agreed to sell the 2nd plaintiff his land on certain terms. Alternatively the plaintiffs claimed specific performance of an agreement embodied in an exchange of letters culminating with a letter from the defendant who wrote that he was delighted that it was the plaintiff who was buying the land and that "the technical details" he would leave to his lawyers. In the further alternative the plaintiffs claimed a contract as set out in an engrossed agreement sent by the plaintiffs' solicitors to the defendant's solicitors on March 13, 1978.

Held: (1) that on a balance of probabilities the plaintiffs had established an oral contract as claimed;

(2) alternatively that there was a completed agreement sent out in the 4 copies of agreement of sale which had been sent by the plaintiffs' solicitors to the defendant's solicitors together with their letter of March 13, 1978;

(3) the facts of this case did not support the inference that the parties intended to be bound only when a formal agreement had been executed.

Cases referred to:-

(1) *Hussey* v. *Horne-Payne* (1878-9) A.C. 311.
(2) *May* v. *Thomson* (1882) 20 Ch. D. 705.
(3) *Bristol etc. Aerated Bread Co.* v. *Maggs* (1890) 44 Ch. D. 616.
(4) *Clifton* v. *Palumbo* [1944] 2 All E.R. 497.
(5) *Lockett* v. *Norman Wright* [1925] 1 Ch. 56, 62.
(6) *Winn* v. *Bull* (1877-78) 7 Ch. D. 29, 32.
(7) *Eccles* v. *Bryant* [1948] Ch. 93, 97.
(8) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 288-289.
(9) *Bolton Partners* v. *Lambert* (1889) 41 Ch. D. 295, 298.
(10) *Cranleigh Precision Engineering Ltd.* v. *Bryant* [1965] 1 W.L.R. 1293.